

Supreme Court, U.S.
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No. 03-1520

In the
Supreme Court of the United States

JEFFREY LEE,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari to
the Alabama Court of Criminal Appeals

BRIEF OF THE STATE OF ALABAMA IN OPPOSITION TO THE PETITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does the Sixth Amendment, as construed in *Ring v. Arizona*, require a jury not only to find the aggravating circumstances that render a defendant eligible for the death penalty but also to determine whether those aggravating circumstances outweigh the mitigating circumstances?

2. Where an aggravating circumstance that makes a defendant eligible for the death penalty corresponds precisely to an element of "capital" murder, does the jury's guilty verdict on the capital murder charge satisfy *Ring*'s requirement that the jury find the existence of aggravating circumstances?

3. On the facts of this case (there being no split alleged), did the prosecutor violate *Batson v. Kentucky* by remarking in passing that the defense had used many of its strikes to remove white jurors?

4. On the facts of this case (there being no split alleged), was the Alabama Court of Criminal Appeals' application of harmless-error doctrine so unreasonable as to warrant summary reversal?

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STATEMENT OF THE CASE

A. Alabama's Tripartite Capital Sentencing Scheme

Alabama's capital sentencing regime is tripartite. A trial for capital murder proceeds through three phases.

1. Guilt Phase

Before a defendant may be sentenced to death, the jury first must find him guilty, beyond a reasonable doubt, of a capital offense. Alabama has designated eighteen specific types of intentional murder as "[c]apital offenses." Ala. Code § 13A-5-40(a). Here, for instance, a jury convicted Lee of capital murder because he killed during the course of a robbery or attempted robbery, *see id.* § 13A-5-40(a)(2), and because he killed two persons by one act or pursuant to one scheme or course of conduct, *see id.* § 13A-5-40(a)(10).

2. Sentencing Phase — Jury

In addition, before a defendant convicted of capital murder may be sentenced to death, the jury must determine whether he committed the murder in conjunction with at least one aggravating circumstance. "Unless, at least one aggravating circumstance ... exists, the sentence shall be life imprisonment without parole," not death. Ala. Code § 13A-5-45(f). Alabama has enumerated ten circumstances as aggravating. *See id.* § 13A-5-49. Some of these aggravating circumstances correspond to, or overlap with, the circumstances that make a murder capital in the first instance. *Compare, e.g., id.* § 13A-5-40(a)(2) (defining as a "[c]apital offense" "[m]urder by the defendant during a robbery in the first degree or an attempt thereof ..."), *with, e.g., id.* § 13A-5-49(4) (defining as an "aggravating circumstance" the fact that "[t]he capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, ... robbery ..."). Accordingly, while the State bears the "burden of proving

beyond a reasonable doubt the existence of any aggravating circumstances," *id.* § 13A-5-45(e), Alabama's capital sentencing scheme makes clear that a jury's verdict convicting a defendant of a type of capital murder characterized by a corresponding aggravator also, by definition, constitutes a finding that at least one aggravating circumstance exists, *see id.* ("[A]ny aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.").

If the jury finds the existence of one or more aggravating circumstances, it must then determine whether the aggravating circumstances outweigh the mitigating circumstances in the case. *See id.* § 13A-5-46(e). If, but only if, the jury finds that the aggravating circumstances outweigh the mitigating (by at least a 10-2 vote, *see id.* § 13A-5-46(f)), it shall return a recommendation of death. *See id.* § 13A-5-46(e)(3). If the jury does not find any aggravating circumstances, *see id.* § 13A-5-46(e)(1), or finds that the aggravating circumstances do not outweigh the mitigating, *see id.* § 13A-5-46(e)(2), it must return a recommendation of life in prison without parole.

3. Sentencing Phase — Judge

Finally, the trial court must review the jury's sentencing recommendation and decide whether to accept it. *See* Ala. Code § 13A-5-47(e). The trial court must make its own determination from the evidence in the case whether an aggravating circumstance exists – provided, however, as noted above, that "an aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing." *Id.* § 13A-5-45(e). After "consider[ing]" the jury's weighing determination, the court must then decide whether the aggravating

circumstances outweigh the mitigating. *See id.* § 13A-5-47(e). In the light of *Ring v. Arizona*, 536 U.S. 584 (2002), the trial court may not override a jury's recommendation of life unless there is evidence that the jury found the existence of at least one aggravating circumstance beyond a reasonable doubt.

B. Facts of Lee's Case

The trial court summarized the essential facts of the case as follows:

> "On December 12, 1998, around noon Jeffrey Lee entered Jimmy's Pawnshop located in Orrville, Dallas County, Alabama, armed with a sawed off shotgun. Immediately upon entering the front door he shot Jimmy Ellis. After shooting Mr. Ellis he shot Elaine Thompson in the face. Continuing his shooting he shot Helen King and again shot Mr. Ellis. Mrs. Thompson and Mr. Ellis died as a result of shotgun blasts from Lee's gun. Mrs. King survived the shooting after lying motionless on the floor pretending to be dead. Lee attempted to take the cash register out of the store but was unsuccessful because of the way it was secured. He left the store and made his escape with his two co-defendants. His actions were captured by a surveillance video and he later confessed after being captured in a motel in Georgia. Lee had been to the pawnshop earlier in the day of the murder where he inquired about purchasing a ring. He left under the ruse of going to get money to pay for the ring but instead returned with a shotgun." (R. 122)

Pet. App. 5.

C. Proceedings and Disposition Below

A jury found Lee guilty of murder made capital because, inter alia, he committed it during an attempted

robbery. *See* Ala. Code § 13A-5-40(a)(2). As noted above, committing capital murder during a robbery is also an aggravating circumstance in Alabama, *see id.* § 13A-5-49(4), and by virtue of its guilty verdict the jury is statutorily deemed to have found the existence of that aggravating circumstance, *see id.* § 13A-5-45(e). At the conclusion of the sentencing hearing, the jury recommended, by a 7-5 vote, that Lee be sentenced to life in prison without parole. Pet. App. 158. After considering the jury's sentencing recommendation, the trial court sentenced Lee to death. Pet. App. 165.

The Alabama Court of Criminal Appeals initially remanded to the trial court to allow that court an opportunity to articulate, in accordance with *Ex parte Taylor*, 808 So. 2d 1215 (Ala. 2001), its reasons for departing from the jury's recommendation. The trial court amended its order to comply with *Taylor*.

While the appeal was pending in the Court of Criminal Appeals, this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). After ordering and considering supplemental briefing concerning *Ring*'s effect on Alabama's capital sentencing statute, the Court of Criminal Appeals affirmed Lee's death sentence. Pet. App. 1-146. In doing so, the court relied on the Alabama Supreme Court's decision in *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002), *cert. denied*, 124 S. Ct. 430 (2003), which had held (i) that where the aggravating circumstance that renders a defendant death-eligible corresponds to a circumstance embedded in the definition of capital murder, *Ring*'s requirement that a jury find aggravating circumstances is satisfied by the jury's conviction of the defendant of capital murder; and (ii) that *Ring* does not require that a jury – as opposed to a judge – finally determine whether the aggravating circumstances outweigh any mitigating circumstances.

The Court of Criminal Appeals correctly recognized that the trial court found one aggravating circumstance to exist – that the murder was committed during a robbery

or attempted robbery. *See* Ala. Code § 13A-5-49(4). The court then held that "[b]ecause the jury convicted [Lee] of the capital offense of robbery-murder, that statutory aggravating circumstance was proven beyond a reasonable doubt." Pet. App. 111. "Therefore," the court stated, "in this case, the jury, and not the judge, determined the existence of the 'aggravating circumstance necessary for imposition of the death penalty.'" *Id.* (quoting *Ring*, 536 U.S. at 609). "Furthermore," the court held, "'*Ring* and *Apprendi* do not require that a jury weigh the aggravating circumstances and the mitigating circumstances.'" *Id.* (quoting *Waldrop*, 859 So. 2d at 1190). Thus, the court held, there was no *Ring* violation in this case.

The Court of Criminal Appeals denied Lee's application for rehearing (Pet. App. 1), and the Alabama Supreme Court denied Lee's petition for certiorari (Pet. App. 169). This petition followed.

REASONS FOR DENYING THE PETITION

This case presents two questions concerning the interpretation and application of this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). The first is whether the sentencing-phase weighing of aggravating and mitigating circumstances is a finding of "fact" necessary to imposition of the death penalty that must be finally performed by the jury. Pet. at 10-14. The second is whether *Ring*'s requirement that the jury find the existence of aggravating circumstances is satisfied where the capital offense itself contains an aggravating circumstance necessary to make the defendant death-eligible, such that the jury's guilt-phase verdict by definition results in a finding that an aggravator exists. Pet. at 14-16. Relying on the Alabama Supreme Court's decision in *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002), *cert. denied*, 124 S. Ct. 430 (2003), the Alabama Court of Criminal Appeals answered no to the first question and

yes to the second, and thus held that Lee's death sentence was valid under *Ring*.

As petitioners correctly point out (Pet. at 10) the State of Alabama has in the past "concede[d]" that "both issues in this case are of national importance and worthy of certiorari review." Br. in Resp. at 8, *Waldrop v. Alabama*, No. 03-5412. The State's position in that respect has not changed. Both issues are indeed important and both, as the petition notes, implicate splits of authority among state courts. Having said that, however, there is water under the bridge. This Court denied certiorari in *Waldrop*, and has subsequently denied certiorari in cases presenting both issues. See *e.g.*, *State v. Pandeli*, 65 P.3d 950 (Ariz.), *cert. denied*, 124 S. Ct. 386 (2003) (weighing issue); *Woldt v. People*, 64 P.3d 256 (Colo.), *cert. denied*, 124 S. Ct. 85 (2003) (corresponding aggravator issue); *see also infra* at 7.

In the light of this recent history, the State opposes Lee's petition as to all four questions presented. With respect to Questions 1 and 2, the State submits this brief only to explain further the issues presented and the state of the case law (and legislation) concerning them. As discussed below (*see infra* at 13-17), the petition does not allege a split of authority or any other ground justifying certiorari with respect to Questions 3 and 4; rather, as to those questions, the petition seeks, at most, fact-bound error correction and thus should be denied.

I. The Question Whether the Sentencing-Phase Weighing of Aggravating and Mitigating Circumstances Must Be Finally Performed by the Jury Implicates a Split of Authority But in the Light of Recent Legislative Developments Affects Fewer States Than It Once Did.

The first question presented is whether the sentencing-phase weighing of aggravating and mitigating circumstances is a "fact on which the [Alabama] legislature [has] condition[ed] an increase in the[ ] maximum punishment" for capital murder within the

meaning of *Ring*, 536 U.S. at 589. If it is, then a trial court would not be entitled to weigh the aggravating and mitigating circumstances for itself and depart from a jury's recommendation of life without parole, as the law of Alabama expressly permits. If it is not, as the Alabama Court of Criminal Appeals held here, then there is no constitutional impediment to a judge weighing aggravating and mitigating circumstances and sentencing a defendant to death on the basis of his own weighing analysis.

A. Although the Weighing Issue Does Implicate a Split of Authority, It Does Not Require This Court's Review.

There is, as the petition points out, a split among the state supreme courts on the weighing issue. On one side of the divide, the Supreme Courts of Alabama, Delaware, Florida, Indiana, and Nebraska, plus the Oklahoma Court of Criminal Appeals, have ruled that the weighing of aggravating and mitigating circumstances need not be performed by the jury under *Ring*. *See Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002); *Ex parte Hodges*, 856 So. 2d 936 (Ala.), *cert. denied*, 124 S. Ct. 465 (2003); *Brice v. State*, 815 A.2d 314 (Del. 2003); *Bottoson v. Moore*, 833 So. 2d 693 (Fla.) *cert. denied*, 537 U.S. 1070 (2002); *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 537 U.S. 1067 (2002); *Wrinkles v. State*, 776 N.E.2d 905 (Ind. 2002); *State v. Gales*, 658 N.W.2d 604 (Neb. 2003); *Torres v. State*, 58 P.3d 214 (Okla. Crim. App. 2002), *cert. denied*, 538 U.S. 928 (2003). On the other side, the Supreme Courts of Arizona, Colorado, Missouri, and Nevada have ruled in the wake of *Ring* that weighing must be performed by the jury. *See State v. Canez*, 74 P.3d 932 (Ariz. 2003), *cert. denied*, 124 S. Ct. 1043 (2004); *State v. Pandeli*, 65 P.3d 950; *Woldt v. People*, 64 P.3d 256; *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003); *Johnson v. State*, 59 P.3d 450 (Nev. 2002).

The State of Alabama cannot and does not deny that this split is both deep (6-4, by our count) and persistent

(*Ring* having been decided more than two years ago). As matters now stand, however, three of the four states whose supreme courts have ruled that weighing must be performed by the jury have amended their statutes; the fourth recently tried, but failed, to do the same. Arizona, Colorado, and Nevada have changed their statutes to require the jury to perform the weighing function. *See* Ariz. Rev. Stat. § 13-703.01; Colo. Rev. Stat. § 18-1.3-1201; Nev. Rev. Stat. § 175.554. The Missouri Legislature recently considered legislation that would have eliminated a provision of the current sentencing statute allowing a judge to determine, among other things, whether aggravating circumstances outweigh mitigating circumstances. *See* 2004 Missouri Sen. Bill No. 838 (Jan. 7, 2004). We are informed, however, that the Missouri bill died in committee.

This recent legislative activity, of course, does not eliminate the split among the state courts; to the extent that the courts and legislatures in Arizona, Colorado, and Nevada perceived that *Ring* compelled their actions, the divide over *Ring*'s meaning is very much alive and well. The legislation does suggest, however, that a ruling by this Court might not have as far-reaching an impact as before.

The basic point here is that nothing makes this case more certworthy than *Waldrop* or any of the other cases presenting the weighing issue that this Court has refused to consider; in fact, the legislative activity discussed above may make it less so. As this Court has denied certiorari before, so it should here.

B. Alabama Courts Have Properly Held That *Ring* Does Not Require Juries To Finally Perform the Weighing Function.

The Alabama Court of Criminal Appeals held that "'*Ring* and *Apprendi* do not require that a jury weigh the aggravating circumstances and mitigating circumstances.'" Pet. App. 111 (quoting *Ex parte Waldrop*, 859 So. 2d 1181, 1190 (Ala. 2002)). Lee

contends, as did Waldrop before him, that the result of the weighing process is a "finding of fact" as that phrase was used in *Ring*, and thus must be finally determined by a jury. Pet. at 10. With respect, Lee is wrong.

As the Alabama Supreme Court held in *Waldrop*, "the weighing process is not a factual determination or an element of an offense" in the *Ring* sense; instead, "it is a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum." 859 So. 2d at 1189. In arriving at that conclusion, the *Waldrop* court emphasized that "the relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof," *id.* (citing *Ford v. Strickland*, 696 F.2d 804, 818 (11th Cir. 1983)), and, further, relying on this Court's precedent, stressed that "the sentencer in a capital case need not even be instructed as to how to weigh particular facts when making a sentencing decision," *id.* (citing *Harris v. Alabama*, 513 U.S. 504, 512 (1995)). Because "the determination whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact or an element of the offense," the *Waldrop* court held, "*Ring* and *Apprendi* do not require that a jury weigh the aggravating circumstances and the mitigating circumstances." *Id.* at 1190.

Lee contends that because "the finding that aggravating circumstances outweigh mitigating factors is an absolute prerequisite to imposing the death penalty ... this is precisely the kind of finding that must be made by the jury." Pet. at 11. In essence, Lee asserts that because a given finding is a prerequisite to a death sentence, it must be a finding of "fact" within *Ring*'s ambit, and must therefore be found by the jury. But Lee's argument assumes its conclusion; it is based entirely on his assumption that findings concerning the weighing process are indeed findings of "fact." Relying in part on this Court's precedent, the Alabama Supreme Court in

Waldrop cogently explained why that is not so. (Nor is there anything inherently suspicious about the *Waldrop* court's reliance on "cases that predate *Ring* and *Apprendi*," as Lee suggests. Pet. at 11. *Ring* did not alter the definition of what constitutes a "fact"; it merely held that findings of "fact" – however defined – that subject an individual to the death penalty must be found by a jury.) The weighing process remains as much a consideration of a myriad of moral factors as it was before *Ring* was decided.

II. The Question Whether *Ring*'s Requirement That a Jury Find Aggravating Circumstances Is Satisfied by a Jury's Verdict Convicting a Defendant of Capital Murder, Where the Definition of Capital Murder Itself Embodies an Aggravating Circumstance, Implicates a Shallow Split of Authority But Does Not Require This Court's Review.

The second issue presented is whether, in certain circumstances, a jury's verdict that a defendant is guilty of capital murder may itself constitute the finding of an aggravating circumstance required by *Ring*. Alabama defines certain categories of intentional murder as "[c]apital" in a statutory provision separate and apart from the provision that defines other kinds of murder and from the provision that enumerates aggravating circumstances. For instance, here, Lee was convicted of the capital offenses of (i) murder during the course of a robbery or attempted robbery, *see* Ala. Code § 13A-5-40(a)(2) , and (ii) murder in which two or more persons are killed by one act or pursuant to one scheme or course of conduct, *see id.* § 13A-5-40(a)(10). The first conviction (robbery-murder) corresponds, or overlaps, with the separate aggravating circumstance of committing murder during the course of robbery. *See id.* § 13A-5-49(4). Thus, the aggravating circumstance necessary to render Lee eligible for the death penalty is built into the definition of capital murder applicable to the conduct for which the jury convicted him. Because the jury has, by virtue of its

guilty verdict, found beyond a reasonable doubt that Lee committed murder during the course of a robbery, it need not make any further findings concerning aggravating circumstances to satisfy the Sixth Amendment.[1]

As the petition acknowledges (Pet. at 14), Arizona and Indiana, like Alabama, permit a jury's guilt-phase verdict to satisfy *Ring*'s requirement that a jury find an aggravating factor necessary for imposing the death penalty, where the aggravator corresponds to an element of the capital offense. *See State v. Ring*, 65 P.3d 915 (Ariz.), *cert. denied sub nom., Arizona v. Pandeli*, 124 S. Ct. 386 (2003); *Williams v. State*, 793 N.E.2d 1019 (Ind. 2003). Delaware and Florida have come to the same conclusion. *See Brice v. State*, 815 A.2d 314 (Del.); *Bottoson v. Moore*, 833 So. 2d 693 (Fla.).

Lee contends, however, that *Woldt v. Colorado*, 64 P.3d 256, conflicts with Alabama law on this issue. Lee is correct that there is tension between *Woldt* and cases out of Alabama, Arizona, Delaware, Florida, and Indiana. In *Woldt*, the Colorado Supreme Court considered challenges to death sentences rendered under a state statute that vested the capital sentencing function exclusively in a three-judge panel, without any input from a jury. After concluding that that scheme violated *Ring* (as *Ring* itself had suggested, *see* 536 U.S. at 608 n.6; *id.* at 620 (O'Connor, J., dissenting)), the *Woldt* court considered the effect, if any, of a Colorado statute that had been passed in the wake of *Ring*. That statute gave the Colorado Supreme Court the discretion, when reviewing a death sentence imposed by a three-judge panel, to examine the jury's guilt-phase verdict for evidence that the jury had "implicitly found one or more of the aggravating factors

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[1] Petitioner here does not challenge the *fact* that Alabama's scheme provides for overlapping aggravators, *see* Pet. at 14 ("Putting aside the appropriateness of making murder in the commission of a robbery an aggravating factor at all . . ."), only that the jury's guilty verdict may constitute a finding that an overlapping aggravator exists.

that the three-judge panel[] found in [its] written findings" and, if so, to uphold the death sentence under *Ring* on that basis. *Woldt*, 64 P.3d, at 270 (discussing Colo. Rev. Stat. §18-1.4-102(8)(a)). The Colorado Supreme Court concluded, as one of three reasons for refusing to apply the state statute, that it would "place judges, the members of this court, in a fact-finding role regarding the existence or non-existence of aggravating factors based on the jury's verdict," a state of affairs it found impermissible under *Ring*. *Id.*

Woldt is distinguishable. Unlike in Colorado, Alabama trial judges do not make inferences as to which aggravating circumstances the jury might have found – an overlapping aggravating circumstance is deemed established as a matter of statute. *See* Ala. Code § 13A-5-45(e) ("[A]ny aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing."). The *Woldt* court noted that "[d]etermination of eligibility ... requires a finding of at least one aggravating circumstance during either the guilt phase or the penalty phase." *Woldt*, 64 P. 3d at 263. It also noted, however, that under the Colorado scheme, "[s]tanding alone, the jury's guilty verdict would support only life imprisonment" and that "[i]n order to impose the death penalty, the jury had to engage in a four-step process and unanimously agree on the death sentence." *Id.* at 264. In contrast, by dint of Alabama statute, death-eligibility in an overlapping-aggravator case is established by the jury's guilty verdict itself, which already contains the aggravating circumstance necessary to render the defendant death-eligible. Thus, Colorado's four-step process at issue in *Woldt*, whether performed by the judge or the jury, is materially different from Alabama's process.

In any event, there is nothing about this case that makes it more certworthy than any of the cases that have come before it – including *Woldt* itself – that this Court

has refused to consider. *See supra* at 6-7. And in fact, the Court's recent decision in *Blakely v. Washington*, 2004 WL 1402697 (U.S. Sup. Ct. June 24, 2004), arguably resolves the overlapping-aggravator issue in Alabama's favor. There, the Court made clear that the measuring stick for *Apprendi* and *Ring* is the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict* ...." *Id.* at *4 (emphasis in original). The fundamental question here is whether a jury's verdict that a defendant is guilty of capital murder may itself constitute the finding of an aggravating circumstance that is required by *Ring*. *Blakely* confirms that in Lee's case, *Ring* was satisfied when the jury returned its verdict finding Lee guilty of capital murder. This is so because, again, the capital offense for which Lee was convicted contained, by definition, the aggravating circumstance (murder committed during the course of a robbery) necessary to make him death-eligible. Because a defendant in Alabama is eligible for the death penalty so long as one aggravating circumstance is proved beyond a reasonable doubt, *see* Ala. Code § 13A-5-45(f), and because that finding was – again, by definition – made by the jury beyond a reasonable doubt in its verdict, *see id.* § 13A-5-45(e), the jury's verdict here satisfied *Ring*.

III. Lee Has Stated No Ground Justifying Certiorari Review of His *Batson* Claim.

Lee also asks this Court to grant certiorari to determine whether the Alabama trial and appellate courts violated *Batson v. Kentucky*, 476 U.S. 79 (1986), when they, as Lee says, "acquiesced" in what Lee contends was a prosecutor's racially discriminatory explanation for striking African-American venire members. Pet. at 18. Specifically, Lee contends that the prosecutor had a "mixed motive" for using peremptory challenges to strike black prospective jurors. Lee acknowledges that the prosecutor "stated facially neutral reasons for striking each juror" (Pet. at 19); however, he points to the prosecutor's remark that "[a]lso, the defense, most of its strikes were striking White jurors" to argue

that the Alabama courts improperly "acquiesced" in the prosecutor's statement that his peremptory challenges were "justified in part because the defense used many of its strikes to exclude white venire members." Pet. 18-19. The Court should deny certiorari for three reasons.

First, Lee did not raise in the Alabama appellate courts the specific *Batson* claim that he makes the focus of the third question presented here. To be sure, Lee argued below that the prosecutor's strikes violated *Batson*. *See* Pet. App. 11-22. But he did not contend, as he does here, that the prosecutor used his peremptory strikes to "make up," in some sense, for the way that the defense had used its strikes. Lee charges in his petition that "the Alabama appellate court ignored the evidence that the prosecutor used his peremptory challenges to even out the racial mix of the jury." Pet. at 21. But, again, that is because Lee never presented an "evening-out" kind of *Batson* claim to that court. Nor, for that matter, did Lee raise his present *Batson* claim in his certiorari petition to the Alabama Supreme Court. Indeed, Lee's petition to this Court does not even contend that the specific *Batson* issue he now presents was raised in or decided by the Alabama appellate courts. *See* Sup. Ct. R. 14.1(g)(i). It is hornbook law that under 28 U.S.C. § 1257(a) a petitioner cannot obtain review in this Court of an issue that he failed to raise properly on his appeal in state court. *See, e.g., Adams v. Robertson*, 520 U.S. 83, 85 (1997); *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *Street v. New York*, 394 U.S. 576, 581-82 (1969). *See also* R. Stern, E. Gressman, et al., *Supreme Court Practice* §3.18(b), at 180 (8th ed. 2002) ("Failure to follow the appellate channels provided by the state is usually fatal to the chances for Supreme Court review.").

Second, and setting the probable jurisdictional defect aside, Lee has failed to demonstrate any compelling reason why this Court should grant certiorari review. This Court's Rule 10, of course, lists several bases for certiorari jurisdiction. *See* Sup. Ct. R. 10. Lee has not invoked, let alone established the existence of, any of

them. He has alleged no conflict among lower federal courts or state courts of last resort; nor has he alleged that the *Batson* issue constitutes an important question of federal law that has not been, but should be, settled by this Court. What Lee seeks – at most – is fact-bound error correction, pure and simple. That, as a rule, is not enough. *See* R. Stern, E. Gressman, et al., *supra*, §4.17, at 255.

Third, and in any event, Lee's present *Batson* claim is meritless. To make his claim, Lee excerpts only a tiny snippet of a much longer oral colloquy between the prosecutor, defense counsel, and the trial judge. Lee's entire claim hinges on the prosecutor's statement that "[a]lso the defense, most of its strikes, were striking White jurors." But the critical *context* of the hearing, which the petition elides with a "* * *" (Pet. at 3) and a passing acknowledgment that "the prosecutor also stated facially neutral reasons for striking each juror" (Pet. at 19), makes clear that no *Batson* violation occurred. The relevant part of that hearing – in which the prosecutor marched through each and every struck juror and explained, in race-neutral terms, his reasons for striking – is reproduced at Pet. App. 149-51. At the end of the prosecutor's explanation, the trial judge ruled that he "ha[d] given factually race neutral reasons for striking." Pet. App. 150.

Notably, Lee's counsel made no objection whatsoever in the trial court to the prosecutor's passing remark about the defense's striking of white jurors. Indeed, the transcript indicates that, after the prosecutor provided race-neutral explanations, Lee's counsel objected to the prosecutor's explanation – presumably on the ground that it was pretextual – with respect to only a single juror, No. 213. Pet. App. 151. As the Alabama Court of Criminal Appeals pointed out, that challenge became moot when No. 213, who had been an alternate, was empanelled. Pet. App. 17.

To prop up his *Batson* claim, Lee refers to yet another passing remark, in which the prosecutor argued – some three months later at a sentencing hearing – that the trial judge should override the jury's life-sentence recommendation and sentence Lee to death. There the prosecutor stated: "The defendant has argued that the jury recommended life without parole. The Court is well aware that the jury in this case struggled long and hard with that issue. The jury was made up of people of different ages, ***different races*** and different backgrounds." Pet. at 19 (quoting Pet. App. 155) (emphasis added in petition). From that statement, Lee says it "can be reasonably inferred that the prosecutor believed that the presence of African-Americans on the jury was responsible for the jury's recommendation of life." Pet. at 19. But that is pure speculation. It could be just as easily said – and with as much support – that the prosecutor believed that the presence of young (or old) or rich (or poor) jurors was responsible for the jury's recommendation. Lee's claim of discriminatory intent hangs by the thinnest of reeds, and is unsubstantiated by anything meaningful in the record.

IV. Lee Has Stated No Ground Justifying Summary Reversal of the Alabama Court of Criminal Appeals' Application of Harmless-Error Doctrine.

With respect to the fourth question presented – concerning the Court of Criminal Appeals' application of harmless-error doctrine – Lee asks *not* that the Court grant certiorari and schedule argument but, instead, that it summarily reverse. Pet. at 22 ("Summary reversal is appropriate here ..."), 24 ("reversal is ... appropriate"). The Court should deny certiorari for two reasons.

First, Lee has failed to preserve his harmless-error argument for this Court's review. Lee's harmless-error argument pertains, he says, to "four different assignments of error." Pet. at 5. Our review of the record indicates that, with respect to the first two alleged errors,

Lee did not challenge the Court of Criminal Appeals' application of harmless-error doctrine either in his application for rehearing to that court or in his certiorari petition to the Alabama Supreme Court. With respect to the third and fourth alleged errors, Lee offered only the most passing argument concerning the Court of Criminal Appeals' harmless-error rulings. *See* Pet. for Cert. at 53, 55, *Lee v. State*, No. 1021971 (Ala.) (filed Oct. 3, 2003) (two paragraphs); App. for Rehearing at 55-56, 57, Lee v. State, No. 00-0084 (Ala. Crim. App.) (filed July 11, 2003) (same).

Second, Lee has not shown that the Court of Criminal Appeals' application of harmless-error doctrine was erroneous, let alone so demonstrably erroneous as to warrant summary reversal. The logic of Lee's position – that the appellate court must have erred in finding various alleged trial errors harmless based on the fact that the jury recommended life, not death – depends, as the petition itself demonstrates, on a series of inferences. From the trial court's remark that in imposing the death penalty it had "considered" the fact that "the vote was seven for life without parole and five for the death penalty, the minimum vote for a life without parole recommendation" (Pet. App. 166), Lee leaps to the conclusion that it "must be presumed that the trial court would have given the jury's recommendation more weight if eight, nine, ten, eleven or all of the jurors, instead of seven, had been in favor of the life sentence." Pet. at 23. The errors could only be viewed as harmless, Lee asserts, if "the court could conclude that not a single *additional* juror would have recommended life." Pet. at 24 (emphasis in original).

But that is just not so. Lee's argument piles inference on top of inference, and saddles the trial judge's "consider[ation]" of the 7-5 vote with more weight than it reasonably can bear, particularly where, as here, the relief sought is summary reversal. As to the fourth question, the petition seeks, at most, ordinary error correction; the Court should simply deny it.

CONCLUSION

For the foregoing reasons, this Court should deny Lee's petition for certiorari.

Respectfully submitted,

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